No. 85-915

Supreme Court, U.S.
FILED
OCT 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IN RE:
"SEARCH WARRANTS"

UNITED STATES OF AMERICA

Respondents,

-against-

THE LAW FIRM OF DANIEL P. FOSTER, P.C.

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THE LAW FIRM OF
DANIEL P. FOSTER, PC
145 West 55th Street
Suite 15A
New York, New York 10019

Attorneys for Petitioner

Of Counsel:

KIT CONELLY DECIOUS

QUESTION PRESENTED

Does the failure of the District Court to afford notice and an opportunity to be heard prior to unsealing an affidavit in support of "warrants" executed upon parties named in the affidavit yet not arrested, charged or indicted or under investigation who are actively moving to quash the "warrants" as void on their face, constitute a denial of due process of law?

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OPINIONS BELOW

The District Court (Bramwell, J.) ordered, ex parte, unsealing of the affidavit in support of the "warrants" on March 29, 1985. On that date Judge Bramwell also ordered all files closed regarding this matter.

The FIRM moved by order to show cause on April 5, 1985 to vacate the order unsealing the affidavit and to mandate its resealing pending application of the United States Attorney to unseal by motion or application on notice. The Court (Bramwell, J.) heard the motion on April 8, 1985 and denied it by written decision and order that afternoon. Both of the District Court's orders are set out in the Appendix (A-6; A-10) The Notice of Appeal was filed on April 8, 1985.

The Court of Appeals for the Second Circuit upon Brief and after oral argument,

affirmed the lower court's decision on July 19, 1985; the decision and transcript of the oral decision are set out in the Appendix. (A-1 - A-5)

JURISDICTION

The ex parte order unsealing the affidavit in support of "search warrants" was entered March 29, 1985. The decision on rehearing was entered April 8, 1985 and Notice of Appeal was filed on that date. The order and decision of the lower court was affirmed by the United States Court of Appeals for the Second Circuit on July 19, 1985. Justice Thurgood Marshall granted Petitioners Motion for Extension of Time to File Petition for Writ of Certiorari on September 11, 1985, to and including October 17, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3).

UNITED STATES CONSTITUTION

AMENDMENT FOUR

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

UNITED STATES STATUTES

28 U.S.C. Section 1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question or where the validity of a State statute is drawn in

in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

UNITED STATES COURT RULES

Pertinent portions of Rules 6 and 41 of the Federal Rules of Criminal Procedure are contained within the Appendix.

STATEMENT OF THE CASE

Petitioner, THE LAW FIRM OF DANIEL P FOSTER, P.C. (hereinafter "FIRM") is a professional corporation, incorporated pursuant to the laws of the State of New York by attorneys admitted to practice and in good standing the states of New York and California, various federal district court and circuit courts of appeals and the Bar this Court, with its principal place of business in the Borough of Manhattan.

On February 17, 1984, the FIRM was the object of massive search and of seizure of approximately one-half million documents and items by a Joint Task Force of federal agents and New York Police officers (JTF), preannounced to the media by FBI spokesmen as a "pre-emptive strike," and accompanied by FBI agent appearances at or interrogatories of clients in more than half a dozen states. There were no arrests, no charges and no indictments upon the alleg-

ations which formed the basis for the "warrants".

The FIRM moved to quash the "warrants" as void and for return of all materials seized -- in both the Southern and Eastern Districts of New York (SDNY and EDNY) -- pursuant to Federal Rules of Criminal Procedure, Rule 41(e) on the ground that the "warrants" were void on their face, that the property seized was not that described in the "warrants," that the "warrants" were obtained by misrepresentations to the Court, and that they were illegally executed.

On March 7, 1984, the EDNY, per Bramwell, J. confirmed on the record the first misrepresentation -- that he had not been informed on the night the "warrant" was sought from him that attorneys of the FIRM had been subpoenaed for the property sought by "warrant" that day, had appeared pursuant to subpoena and the Court, Nickerson, J., had ordered the materials

produced the following afternoon at 1:45 for claims of attorney-client privilege.[1] However, based on the government's representations of "ongoing grand jury proceedings" in the EDNY, the FIRM's motion was denied pursuant to Standard Dry Wall v. United States, 668 F.2d 156 (1982), cert. den., 456 U.S. 927 (1982). The SDN (per Lasker, J.) rendered a similar decision the following month.

There were no "ongoing grand jury pr ceedings," charges or prosecutions upon the allegations which gave rise to the "warrants."

These allegations were contained in the affidavit in support of the "warrants -- an FBI agent's hearsay affidavit (here inafter HERMAN AFFIDAVIT) which relied in

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[1] This appearance was never made -- i was precluded by the search and seizure.

large part upon an eleven year-old informant's affidavit submitted against a FIRM client in a Suffolk County criminal case which had been dismissed due to the lack of credibility and reliability of that informant in 1975. The Court was not informed of these facts. This affidavit was ordered sealed upon ex parte motion of the United States Attorney on February 22, 1985.

On November 16, 1984, the SDNY (per Lasker, J.) ruled upon Petitioner's subsequent motion for Rule 41(e) relief, making clear the illegal nature of the search and seizure. (A - 17,18) It declined to rule as to property seized in the EDNY, referring Petitioners to the EDNY as the more appropriate jurisdiction, in opinion of April 1, 1985.

Two days before, the government obtained an ex parte order from Judge Bramwell unsealing the HERMAN AFFIDAVIT. (A -16)

The FIRM, upon learning of this order ex post facto alleged jeopardy to its motion to quash the "warrants" as void on their face and moved for vacatur of the ex parte order and resealing of the HERMAN AFFIDAVIT pending noticed application of the Assistant United States Attorney to unseal. The Court (Bramwell, J.) denied the motion on April 8, 1985. (A - 6 - 10)

On May 8, 1985 the Middle District of North Carolina stayed proceedings before it, United States v. Reid, which were the fruit of the search of the FIRM -- giving rise to a charge characterized by the government as a single one-count indictment, local in nature and unrelated to the allegations upon which the "warrants" were obtained. That Court ruled that the District of seizure was the appropriate venue to rule upon the legality of the search and seizure.

The government submitted no res-

ponding papers, affidavits or evidence in opposition to Petitioner's Rule 41(e) motion.[2] The day before it was scheduled for hearing, May 30, 1985, the government proffered, by letter, return of all materials seized more than fifteen months before. On that representation the Court declined to exercise its jurisdiction to hear the FIRM's motion for Rule 41(e) relief. (A - 11-15) On the date scheduled for this hearing and since, the government has repeatedly affirmed that its "investigation" in this matter is closed.

The FIRM appealed both the decision of Judge Nickerson declining to exercise jurisdiction of the EDNY to hear and rule upon the FIRM's Rule 41(e) motion and Judge Bramwell's ex parte order unsealing the HERMAN AFFIDAVIT and decision denying

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[2] On appeal -- for the first time -- the government submitted a contravening factual statement -- unsworn. This just reaffirms Petitioners position that the matter should be heard.

vacatur of the order pending noticed hea
ing. The Court of Appeals for the Secon
Circuit, in decision of July 19, 1985,
ruled the first a non-appealable order a
affirmed the second. (A - 3-5)

On September 11, 1985, Mr. Justice
Marshall ordered that time for filing
Petition for Writ of Certiorari as to
Judge Bramwell's order and decision be e
tended thirty days, to and including
October 17, 1985. (A - 19)

The materials seized from the FIRM
February 17, 1984 to date have not been
turned, despite representations of the
Assistant United States Attorney and the
JTF - 2 and direct orders of the EDNY an
Second Circuit Court of Appeals.

ARGUMENT

The District Court's ruling, denying Petitioner notice and opportunity to be heard prior to unsealing affidavit in support of "search warrants" executed upon them in circumstances in which there were no subsequent proceedings, charges or open investigation, and the Court of Appeals affirmance thereof were contrary to this Court's enunciated policy and so far removed from the accepted and usual course of judicial proceedings as to require an exercise of this Court's power of supervision.

The District Court undertook the "extraordinary action" of sealing the HERMAN AFFIDAVIT at the government's request five days after the "warrants" were executed. See In re Search Warrant for Second Floor Bedroom, 489 F. Supp. 207 (1980). Petitioner FIRM undertood to quash the "warrants" and obtain return of the

documents seized pursuant to F.R.Cr.P., Rule 41(e). The government did not unseal the material at that time, but rath continued the appearance of the existenc of a grand jury proceeding for over a ye The HERMAN AFFIDAVIT was no less "neces- sary" for purposes of adjudication prior to April, 1985 than it was after that time. In fact the timing of the govern- ment's ex parte application to unseal th affidavit made it available to attempt t prejudice any consideration of the "warrants" as void on their face.

The Court's decision of April 8, 19 refers to three reasons relied upon by t government in its initial application to seal the HERMAN AFFIDAVIT. While the Court did not find the government's re- liance on secrecy of grandjury proceedin persuasive in its application to seal th affidavit initially, that does not mean that the policy considerations governing determinations pursuant to F.R.Cr.P.,

Rule 6(e) would be inapplicable as guide for determinations to seal or unseal material other than Grand Jury proceedings. The Court relied on two other reasons presented by the government -- protection of confidential sources and prevention of hindrance of the government's investigation -- in granting its application to seal the HERMAN AFFIDAVIT. These reasons are analogous to two of the five this Court has enumerated for grand jury secrecy --

> "(T)o prevent subornation of perjury or tampering with the witness who may later testify before (the) grand jury and later appear at the trial of those indicted by it; and ... to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes." United States v. Proctor & Gamble Co., 356 U.S. 677, 681 - 82, N.6 (1958).

In that case, this Court also identified as reasons for grand jury secrecy the protection of an "innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and

from the expense of standing trial where there was no probability of guilt." The FIRM submits that an analogous reason existed here for the HERMAN AFFIDAVIT's remaining sealed -- not a single person - individual or corporate -- named in the affidavit has been indicted or otherwise chargedin the fifteen months since execution of the "warrants" despite the gravity of the allegations in the affidav These include clients named merely becaus they chose this law firm to represent the

The District Court in the instant ca held that the affidavit did not warrant r maining sealed because of any relation to a grand jury matter, citing In re Search

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[3]Yet, since obtaining the unsealing order, the Assistant United States Attorn has actively disseminated HERMAN AFFIDAVI -- providing it to adversary attorneys in civil litigation involving FIRM clients (and having nothing to do with the subjec of the affidavit or the search) and even the media. As a result, the FIRM has increasingly found itself having to litigat its own bona fides before it can litigate its clients' cases.

Warrant for Second Floor Bedroom, supra, 489 F. Supp. at 211 (1980). That case -- one of the few considering the sealing of non-grand jury material -- held that statements compiled prior to submission to a grand jury did not constitute grand jury matter for purposes of F.R.Cr.P., Rule 6(e). It did not hold the policy considerations governing Rule 6(e) determinations inapplicable to consideration of sealing non-grand jury matter. In fact, that Court then proceeded to apply a balancing test to decide the motion to unseal the statements, just as the Court did in In re Sealed Affidavit(s) to Search Warrants Executed February 14, 1979 (U.S. v. Agosto), Misc. Civ. 722 (D. Nev. Oct. 3, 1979) on remand from 600 F.2d 1256 (9th Cir., 1979). The Ninth Circuit, after having held that the District Courts do have the authority to seal affidavits, ordered the District Court to consider whether sealing of the affidavit would be consistent with the Court's power in that

case and, if it determined that the matt should be disclosed, what limitations should be placed on that disclosure. 600 F.2d at 1258.

In United States v. Hubbard, 650 F. 293 (D.C. Cir., 1980), the Court of Appe reversed an order of the District Court sealing non-grand jury matter, again app ing a balancing test. In both Hubbard a In re Search Warrants for Second Floor Be room, supra, the Courts balanced the con siderations put forward by the governmen against those asserted by third parties against disclosure in Hubbard and for di closure in In re Search Warrants. Both courts allowed consideration of the thir party claims.

In the instant case, the Court did not engage in a balancing test before ordering the unsealing. The unsealing w ex parte. The FIRM moved to vacate the order and to have the matter heard on

notice, which was denied. The Court did not balance the considerations put forward by the government and the FIRM in its decision; it denied the hearing at which it would balance such considerations. In oral argument, both parties indicated what factors would be the subject of the Court's consideration. The government represented that the reasons it had urged for sealing were no longer applicable and that the United States Attorney for the Middle District of North Carolina had requested its unsealing on the possibility that Miss Reid would move to suppress evidence seized from the FIRM on February 17, 1984 in United States v. Reid, a criminal proceeding in that district. The FIRM, on the other hand, urged that unsealing could result in denial of due process of law in the effect of indiscriminate use of the affidavit in other, related

proceedings and that it would prejudice FIRM and clients in the course of adversary litigation in its day to day practice, permitting clients to be attacked on the basis of the association of counsel alone. The FIRM also requested that as a result of a hearing, a limited orde be fashioned which would meet any legitimate concern for compliance with Rule 41(g) in the North Carolina proceedings yet not jeopardize the due process right of the FIRM and its clients.

There is precedent for the Court's fashioning of such orders in cases considering motions for disclosure pursuant to F.R.Cr.P., Rule 6(e). In In re Biagg 478, F.2d 489 (2d Cir., 1973) this Court identified the three exceptions that Rul 6(e) provides to the rule of grand jury secrecy. In discussing the third and mo widely used of these exceptions, this Court stated:

> "Balancing the interest of secrecy of the grand jury proceedings against the goal of a just result in a judicial proceeding, this exception rules in favor of the latter -- subject, however, to the detailed control of the judge. 478 F.2d at 492 (Emphasis added).

This Court then applied that standard in the subsequent case of United States v. Sobotka, 623 F.2d 764 (2d Cir., 1980) in which a Bar Association grievance committee sought disclosure of grand jury testimony. Holding that the grievance committee's inquiry was clearly preliminary to or in connection with a judicial proceeding within Rule 6(e), the Court found that this did not mean that disclosure was automatically authorized.

> "Even where the literal requirements of Rule 6(e) are met, the Court which is requested to direct the disclosure must balance the goal of a just result in a judicial proceeding against the countervailing policy of grand jury secrecy. ***
>
> "(T)he showing of need must be made 'with particularity' so that the 'secrecy of the proceedings (may be) lifted discreetly and

limitedly.' (Citing United States v. Proctor & Gamble, 356 U.S. 677, 682-83 (1958) and Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 221 (1979)) ***

"The only particularity set forth in the letter is that the Committee be permitted to obtain 'such portions' of the transcript as would permit it to adequately identify the witness against Sobotka. But that objective surely could have been achieved by an order disclosing the names and addresses of the witnesses rather than the full transcripts which were ordered to be divulged. ***

"The disclosure order must be structured to cover only the material required in the interests of justice. Douglas Oil Co. v. Petrol Stops Northwest, supra, 441 U.S. at 222. 623 F.2d at 767-769 (Emphasis Added)

The FIRM submits that the policy c iderations and balancing test required this Court in questions of Rule 6(e) di closure should have been applied in the stant case.

For non-grand jury matters, polic will ordinarily favor disclosure pursua to Rule 41(g). The primary beneficiari of this Rule are those who have been su

jected to the search. In re Search Warrant for Second Floor Bedroom, supra, at 208, n. 1 (1980). Those who were subjected to the search are the FIRM and those it represents, and it is they who sought to have the affidavit remain sealed.

Petitioner has found no cases prior to the last decade which consider the questions raised by the Courts' sealing of non-grand jury matter. It is apparent that the government does not consider the provisions of Rule 6(e) sufficient for its enforcement purposes. With increasing sealing of non-grand jury matters in the last five years, the situation cries out for policy guidance to the Circuit Courts of Appeals. Here, the unsealing was arbitrary; since the reason given did not either warrant or require unsealing, Petitioner believes it must have been sought for another reason -- solely to facilitate denial of hearing on Petit-

limitedly.' (Citing United States v. Proctor & Gamble, 356 U.S. 677, 682-83 (1958) and Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 221 (1979)) ***

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The FIRM submits that the policy conideration and balancing test required by this Court in questions of Rule 6(e) disclosure should have been applied in the instant case.

For non-grand jury matters, policy will ordinarily favor disclosure pursuant to Rule 41(g). The primary beneficiaries of this Rule are those who have been sub-

jected to the search. In re Search Warrant for Second Floor Bedroom, supra, at 208, n. 1 (1980). Those who were subjected to the search are the FIRM and those it represents, and it is they who sought to have the affidavit remain sealed.

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ioner's motion quash the "warrants" in this matter.[4] No harm could have come from a full hearing on the ramifications of the unsealing as to all persons affected thereby, and Petitioner's rights would have been protected. Disclosure was deserving of greater scrutiny in a circumstance such as this where no indictment had been returned. In re Grand Jury Subpoenas, April, 1978, etc., 581 F.2d 1103 (4th Cir., 1978) cert. den. 440 U.S. 971 (1979). As the Court noted in In re Search Warrant for Second Floor Bedroom, supra, at 212:

> "The government's fears here are purely speculative. To allow it to prevail upon such a weak showing of injury would reduce this Court to a mere rubber stamp for the government. It would be an abdication of judicial responsibility to order sealing whenever the government makes unsupported claims of harm. (Emphasis added)

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[4]This is further supported by the fact that this same Assistant United States Attorney provided a copy of the HERMAN AFFIDAVIT to an Assistant United States Attorney in another district for use in civil litigation in July, 1984 without

The FIRM submits that the policies governing disclosure pursuant to Rule 6(e) afford consideration of the interests of both the government and those who have been the object of investigation without prosecution. Further, the FIRM submits that notice to the intended beneficiaries of F.R.Cr.P., Rule 41(g), and other applicable rules, whould be required for sealing materials to which they would otherwise be entitled access, and for any subsequent application to unseal. The distinct lack of procedural process available to those against whom the government takes a step initiating an investigation and proceeds no further -- against whom the investigation was initiated in error in the first place -- must be remedies through this Court's exercise of its supervisorial powers.

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obtaining an order for unsealing; far less permissible under the cases than providing a copy in the instance the Assistant United States Attorney alleged before the Court. United States v. Sells Engineering, Inc., 51 L.W. 5060 (81 - 1032, June 30, 1983).

CONCLUSION

Petitioner submits that the rulings of the District Court, affirmed by the Circuit of Appeals, denied to it notice and an opportunity to be heard in direct violation of the policies of this Court and so far removed from the accepted and usual course of judicial proceedings as to require an exercise of this Court's power of supervision.

WHEREFORE, Petitioner prays that this Court exercise its discretion and grant this Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

DATED: October 15, 1985

Respectfully submitted,

The Law Firm of Daniel P. Foster, P.C.
145 West 55th Street
Suite 15A
New York, New York 10019

Of Counsel:
KIT CONELLY DECIOUS

APPENDIX

Certification of the United States Court of Appeals for the Second Circuit, Dismissing Appeal

United States Court of Appeals

for the

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of July, one-thousand nine hundred and eighty-five.

Present: Honorable Lawrence W. Pierce,
Honorable George C. Pratt,
Circuit Judges
Honorable Dudley B. Bonsal,*
District Judge

IN RE EX PARTE DECIOUS, ET AL.,

IN RE "SEARCH WARRANTS"

- - - - - - - - - - - - -

THE LAW FIRM OF DANIEL P. FOSTER, P.C.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

NO. 85-6147, 85-1127

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the appeal from order of said District Court be and it hereby is dismissed in accordance with the oral opinion rendered in open court.

Elaine B. Goldsmith,
Clerk

By: Edward J. Guardaro,
Deputy Clerk

*United States District Judge for the Southern District of New York sitting by designation.

Certification of the United States
Court of Appeals
for the Second Circuit, Oral
Opinion Dismissing Appeal

United States Court of Appeals
For the Second Circuit

BEFORE: Honorable Lawrence W. Pierce,
Honorable George C. Pratt,
Circuit Judges
Honorable Dudley B. Bonsal
District Judge
NO: 85-6147, 85-1127

IN RE "SEARCH WARRANTS"

EX PARTE DECIOUS, ET AL.,

- - - - - - - - - - - - - - - -

THE LAW FIRM OF DANIEL P. FOSTER, P.C.,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee

THE COURT: Thank you.

With respect to the latter argued appeal, number 851127, the appeal seeks reversal of Judge Bramwell's Order unsealing an affidavit upon which a search warrant was issued for the premises of the law firm of

of Daniel P. Foster, P.C.

The 1979 Supreme Court case of Nixon versus Warner Communications, Incorporated, 435 U.S. 589, makes it clear that the standard of review in such a case is whether the District Court abused its discretion.

In our view, Judge Bramwell did not abuse his discretion. For this reason, the Order of the District Court is affirmed and it is so ordered.

With respect to the appeal bearing docket number 856147, this appeal seeks vacature and remand of Judge Nickeron's ruling declining to exercise jurisdiction over a Rule 41E motion made by the firm.

The Government represented to Judge Nickerson and the firm that it was willing to return the property seized during the search of the firm's premises.

The firm continues to seek 41E relief, however, and its avowed intent in pressing this appeal is to obtain suprression of the evidence seized during the search, and the

fruits thereof.

It is clear to us that the motion sought more than the mere return of the property. Therefore, under the 1962 Supreme Court case of DaBella (sic) versus United States, 369U.S.121 and its progeny, Judge Nickerson's ruling is not appealable at this time.

The appeal is dismissed and it is so ordered.

Thank you both.

Transcription of Order of July 19, 1985

Decision and Order of the United States District Court for the Eastern District of New York

No. 84 Misc. 149

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Present: Honorable Henry Bramwell
District Judge

EX PARTE DECIOUS, ET AL.

IN RE "SEARCH WARRANTS,"

Pursuant to an order to show cause dated April 5, 1984, Kit Conelly Decious, Esq. requests that this Court issue an order vacating a March 29, 1984 order, which unsealed an affidavit in support of a search warrant executed on the law offices of Daniel Foster and Associates on or about February 17, 1984, and mandating that the affidavit be resealed pending application of the United States Attorney to unseal by motion or application on notice. After careful consideration of the affidavit and memo-

randa of law submitted by Ms. Decious and the applicable case law, the Court is of the opinion that her request must be denied.

Rule 41(g) of the Federal Rules of Criminal Procedure provides that all papers concerning a search warrant shall be filed with the Clerk of the Court. Although the rule does not specifically refer to affidavits, the requirement that "all other papers in connection therewith" shall be filed seems to encompass them. In Re Search Warrant for Second Floor Bedroom, 489 F. Supp. 207 (D.R.I. 1980). Thus, those courts which have considered applications to seal or unseal affidavits have assumed that sealing is an extraordinary action. Id. at 209. (Citation omitted). Indeed, the policy underlying public access to court records is an important one. Id. See also, United States v. Hubbard, 650 F.2d 293, 317-18 (D.C.Cir. 1980).

On the other hand, this Court has inherent power to seal affidavits "as an

incident of [its] constitutional function, to control papers filed with the courts within certain constitutional and other limitations." In re Sealed Affidavit(s) to Search Warrants, 600 F.2d, 1256, 1257 (9th Cir. 1980). The decision to seal is clearly a discretionary matter to be exercised in light of the relevant facts and circumstances of a particular case. See Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978).

In this case, the applicant argues that the affidavit in question should remain sealed because it relates to a grand jury matter. In support of her application, Ms. Decious relies on 6(e) of the Federal Rules of Criminal Procedure which prohibits disclosure of "matters occuring before the grand jury." The veil of secrecy, however, covers the grand jury proceedings not the subject matter of the investigation. In Re Search Warrant, supra, 489 F. Supp. at 211. A careful reading of the affidavit

in issue does not indicate that it stems from grand jury proceedings. On the contrary, paragraphs 24 and 25 simply state that grand jury subpoenas duces tecum were served on Ms. Decious and Mr. Foster on February 16, 1984 and that both parties appeared before Judge Nickerson to contest the validity of the subpoenas. This is insufficient to bring the affidavit within the purview of Rule 6(e).

In so finding the Court is cognizant of the fact that the government cited the secrecy of the grand jury proceedings as one of its arguments in support of its original application to seal the affidavit. The Court notes, however, that in granting the original application, it relied primarily on the other two reasons cited by the government which no longer apply. Had the government relied solely on Rule 6(e), its application to seal would likewise have been denied.

For the reasons stated above, application to vacate the March 29, 1985 order and to reseal the affidavit in question is denied in all respects.

SO ORDERED.

Henry Bramwell
U.S.D.J.

Dated: Brooklyn, New York
April 8, 1984

Memorandum and Order of the United States District Court, Eastern District of New York

No. 85 C 1654

UNITED STATES DISTRICT COURT

Eastern District of New York

PRESENT: Honorable Eugene H. Nickerson
District Judge

EX PARTE DECIOUS, et al.

IN RE "SEARCH WARRANTS"

Movants seek an order quashing the warrants executed upon them on or about February 17, 1984 within the Eastern District of New York and directing the return of all property seized thereunder pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. The government represents that it intends to return voluntarily all the property seized from this district and that the motion is moot.

Rule 41(e) provides that a "person aggrieved by an unlawful search and seizure

may move the district court for the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized." If the court grants the motion to restore the property, "it shall not be admissible in evidence at any hearing or trial." Id. Rule 41(f) provides that a "motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12."

Rule 41(e) clearly permits the court to entertain this motion for the return of property seized in this district, even though no trial is pending here. However, the rule does not give aggrieved parties the absolute right to have their motions decided in the district of seizure. See Application of Herr, 473 F. Supp. 1304 (S.D.N.Y. 1979); United States v. Lester, 21 F.R.D. 30 (S.D.N.Y. 1957). When the court is not the trial court, it is more

appropriate to exercise jurisdiction under this rule only where declining to do so would cause the moving party irreparable harm. See In re Grand Jury Proceedings, 466 F. Supp. 863, 866 (D.Minn. 1979).

Since the government represents that it will voluntarily return all the property taken from the Eastern District, the movants will not obtain a ruling at this time on whether the property itself, or any "fruits" of that property, would be admissible at a trial. The policy of Rules 41(e) and (f), however, expressly favors that motions to suppress evidence be made in the trial court, so that all pretrial motions can be disposed of in a single court appearance. See 1972 Advisory Committee Notes.

A consideration other than that of judicial economy counsels against the court's ruling on the admissibility of evidence in this action. No indictment has been handed down in this district, no trial is pending here, and the government is

willing to return the property. Declining to exercise jurisdiction will avoid the risk of prematurely and inadequately determining the admissiblity of evidence at a trial, see United States v. Lester, 21 F.R.D. 30 (S.D.N.Y. 1957), and will ensure that such a determination is made only after a proceeding that is properly adversarial.

The court is informed that a criminal trial is pending before the District Court for the Middle District of North Carolina, United States v. Amanda Reid, in which the government might seek to introduce this property or fruits thereof as evidence. If the government intends to do so, it will be most appropriate for the court fully familiar with the litigation to determine whether the evidence is admissible in that action, where the parties are clearly adversaries and the issue is ripe for resolution. Movants' arguments as to why that

court is inappropriate are unpersuasive.

The court exercises its discretion to decline jurisdiction on the condition that the government return movants' property. Nothing in this decision shall be deemed to prejudice or waive any rights the movants have to make a suppression motion in any district court where a trial is pending. So ordered.

Dated: Brooklyn, New York
June 7, 1985

Mr. Gallagher, knows, for law enforcement purposes anywhere, that the plaintiffs have been granted full relief except for the possibility that in spite of Mr. Gallagher's good faith representations, he may be incorrect, and I state for the record that my denial of further relief is explicitly conditioned on the proposition that the plaintiff not be deemed to have waived any rights which it would otherwise have under Rule 41 B, or any other rights, to move to suppress the use of any such documents or copies of documents unless they are hereafter legally and properly seized for law enforcement purposes. All right?

Order of the Supreme
Court of the United States,
Extending Time

No. A-193

SUPREME COURT OF THE UNITED STATES

Present: Honorable Thurgood Marshall
Associate Justice of the
Supreme Court of the
United States

THE LAW FIRM OF DANIEL P. FOSTER, P.C.,

Applicant,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION
WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 17, 1985.

Dated this 11th day of September, 1985

Thurgood Marshall
Associate Justice of
the Supreme Court of
the United States

STATUTES INVOLVED

Federal Rules of Criminal Procedure,
Rule 6(e)

Secrecy of proceedings and disclosure.

(2) General rule. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(2) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury,

other than its deliberations and the vote of any grand juror, may be made to--

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made --

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters

occurring before the grand jury; or

(iii) when the disclosure is made by an attorney for the government to another federal grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(4) Sealed indictments. The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant and summons.

(5) Closed hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

(6) Sealed records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 41(e): Motion for Return of Property: A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be trea also as a motion to suppress under Rule 1

Rule 41(g): Return of Papers to Clerk:

The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

No. 85-915

Supreme Court, U.S.
FILED
NOV 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IN RE:
"SEARCH WARRANTS"

UNITED STATES OF AMERICA

Respondents,

-against-

THE LAW FIRM OF DANIEL P. FOSTER, P.C.

Petitioners.

SUPPLEMENTAL APPENDIX

KIT CONELLY DECIOUS
THE LAW FIRM OF
DANIEL P. FOSTER, PC
145 West 55th Street
Suite 15A
New York, New York 10019

Attorneys for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

IN RE:

"SEARCH WARRANTS"

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United States of America

Respondents,

-against-

The Law Firm of Daniel P. Foster, P.C.

Petitioners.

ERRATA SHEET

A. Delete page A-1 through A-10 of the original appendix in favor of pages A-1 through A-9 in the supplemental appendix.

B. Delete pages A-11 through A-15 of the original appendix.

Judgment of the United States Court of Appeals for the Second Circuit

United States Court of Appeals

for the

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of July, one-thousand nine hundred and eighty-five.

Present: Honorable Lawrence W. Pierce,
Honorable George C. Pratt,
Circuit Judges
Honorable Dudley B. Bonsal, *
District Judge

UNITED STATES OF AMERICA,

Appellee.

v.

THE LAW FIRM OF DANIEL P. FOSTER, P.C.,

Appellant.

No. 85-1127

Appeal from the United States Distr
Court for the Eastern District of New Yor

This cause came on to be heard on th
transcript of record from the United Stat
District Court for the Eastern District o
New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now
hereby ordered, adjudged and decreed that
the order of said District Court be and i
hereby is affirmed in accordance with the
oral opinion rendered in open court.

Elaine B. Goldsmith,
Clerk

By: Edward J. Guardaro
Deputy Clerk

*United States District Judge for the Southern District of New York sitting by designation.

Transcript of the United States
Court of Appeals
for the Second Circuit,
Oral Opinion

UNITED STATES COURT OF APPEALS

For The Second Circuit

In re "Search Warrants",

The Law Firm of Daniel P. Foster, P.C.

versus

United States of America

- -

BEFORE: Honorable Lawrence W. Pierce,
Honorable George C. Pratt,
Circuit Judges
Honorable Dudley B. Bonsal
District Judge

U.S. District Court
Foley Square
New York, New York

July 19, 1985
1:14 P.M.

THE COURT: Thank you.

With repsect to the latter argued appeal, number 851127, the appeal seeks reversal of Judge Bramwell's Order unsealing an affidavit upon which a search warrant was issued for the premises of the Law Firm of Daniel P. Foster, P.C.

The 1979 Supreme Court case of Nixon versus Warner Communications, Incorporated, 435 U.S. 589, makes it clear that the standard of review in such a case is whether the District Court abused its discretion.

In our view, Judge Bramwell did not abuse his discretion. For this reason, the Order of the District Court is affirmed and it is so ordered.

Transcription of Order of July 19, 1985

Decision and Order of the United States District Court for the Eastern District of New York

No. 84 Misc. 149

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Present: Honorable Henry Bramwell
District Judge

EX PARTE DECIOUS, ET AL.

IN RE "SEARCH WARRANTS,"

Pursuant to an order to show cause dated April 5, 1985, Kit Conelly Decious, Esq. requests that this Court issue an order vacating a March 29, 1985 order, which unsealed an affidavit in support of a search warrant executed on the law offices of Daniel Foster and Associates on or about February 17, 1984, and mandating that the affidavit be resealed pending application of the United States Attorney to unseal by motion or application on notice. After careful consideration of the affidavit and memo-

randa of law submitted by Ms. Decious and the applicable case law, the Court is of the opinion that her request must be denied.

Rule 41(g) of the Federal Rules of Criminal Procedure provides that all papers concerning a search warrant shall be filed with the Clerk of the Court. Although the rule does not specifically refer to affidavits, the requirement that "all other papers in connection therewith" shall be filed seems to encompass them. In Re Search Warrant for Second Floor Bedroom, 489 F. Supp. 207 (D.R.I. 1980). Thus, those courts which have considered applications to seal or unseal affidavits have assumed that sealing is an extraordinary action. Id. at 209. (Citation omitted). Indeed, the policy underlying public access to court records is an important one. Id. See also, United States v. Hubbard, 650 F.2d 293, 317-18 (D.C.Cir. 1980).

On the other hand, this Court has inherent power to seal affidavits "as an

incident of [its] constitutional function, to control papers filed with the courts within certain constitutional and other limitations." In re Sealed Affidavit(s) to Search Warrants, 600 F.2d, 1256, 1257 (9th Cir. 1980). The decision to seal is clearly a discretionary matter to be exercised in light of the relevant facts and circumstances of a particular case. See Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978).

In this case, the applicant argues that the affidavit in question should remain sealed because it relates to a grand jury matter. In support of her application, Ms. Decious relies on 6(e) of the Federal Rules of Criminal Procedure which prohibits disclosure of "matters occuring before the grand jury." The veil of secrecy, however, covers the grand jury proceedings not the subject matter of the investigation. In Re Search Warrant, supra, 489 F. Supp. at 211. A careful reading of the affidavit

in issue does not indicate that it stems from grand jury proceedings. On the contrary, paragraphs 24 and 25 simply state that grand jury subpoenas duces tecum were served on Ms. Decious and Mr. Foster on February 16, 1984 and that both parties appeared before Judge Nickerson to contest the validity of the subpoenas. This is insufficient to bring the affidavit within the purview of Rule 6(e).

In so finding the Court is cognizant of the fact that the government cited the secrecy of the grand jury proceedings as one of its arguments in support of its original application to seal the affidavit. The Court notes, however, that in granting the original application, it relied primarily on the other two reasons cited by the government which no longer apply. Had the government relied solely on Rule 6(e), its application to seal would likewise have been denied.

For the reasons stated above, application to vacate the March 29, 1985 order and to reseal the affidavit in question is denied in all respects.

SO ORDERED.

Henry Bramwell
U.S.D.J.

Dated: Brooklyn, New York
April 8, 1985